IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

1. S.B.Civil Writ Petition No.6233/1991
   Bhanwar Lal. vs. State of Raj. & ors.

2. S.B.Civil First Appeal No.29/1991
   Dil Azad Khan vs. Raj. Board of Muslim Wakfs.

3. S.B.Civil Revision Petition No.622/1991
   Raj. Board of Muslim Wakfs. vs. Bhanwarlal.

4. S.B.Civil Revision Petition No.623/1991
   Raj.Board of Muslim Wakfs. vs. Dil Azad Khan & Ors

Date : 3.8.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.S Joshi, for petitioner LRs. of Bhanwar Lal.

Mr.J Chopra, for respondent Raj.Board of Muslim Wakf.

Mr.T Gupta) for respondent LRs. of Dil Azad Khan.
Mr.JK Bhaiya)

Mr.SN Tiwari, Dy.GA, for respondent State.

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BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

Action of the Wakf Board is under consideration in these matters – One writ petition preferred by Bhanwarlal (now deceased) having no.6233/1991, another is regular first appeal having no.29/1991 preferred by Dil Azad Khan and two revision petitions having no.622/1991 and 623/1991 preferred by Rajasthan Board of Muslim Wakf (for short 'Wakf Board').

Since the facts of the case are interconnected and there is change in law as New Wakf Act of 1995 has been enacted subsequent to the passing of the order by the District Collector and District Judge and after the decision of the trial court in suit filed by Dil Azad Khan, therefore, all these matters are decided together.

The facts of the case are that the Wakf Board initially claimed that the land in dispute, which is in possession of Dil Azad Khan (now deceased) was wakf property and a proper declaration has been made under the provisions of Rajasthan Wakf Act and proper notifications have been published in gazette under Section 5 of the Wakf Act on 16.6.1966. The property has been shown at S.No.77 in the list of wakf properties. Dil Azad Khan was mutawalli of the said Wakf and he was removed by the order of Wakf Board dated 17.7.1967. Since Dil Azad Khan did not deliver

the possession of the property to the Wakf Board, therefore, an application dated 26.10.1967 was submitted by the Secretary, Wakf Board seeking execution of an order of Wakf Board dated 28.7.1967 in the Court of Civil Judge, Udaipur. In the said application, it is stated that the Wakf Board has passed the order of eviction against said Dil Azad Khan from Araji No.1926 measuring 2 bighas 14 biswas situated near Tourist Bungalow, Udaipur and since he has not delivered the possession, therefore, the order be executed by the civil court.

Notices were issued to Dil Azad Khan who submitted several objections against the executability of the order dated 28.7.1967 of Wakf Board. Though there were several objections but the execution of the order dated 17.7.1967 sought by the Wakf Board was dismissed by the learned Civil Judge, Udaipur. Wakf Board, therefore, preferred appeal in the District Court which was allowed by the District Judge, Udaipur vide order dated 29.7.1973. The learned District Judge, Udaipur rejected the contention of the Wakf Board that the property in possession of Dil Azad Khan is covered by entry at S.No.77 of the list of the properties of Wakf situated in Udaipur City of Rajasthan. Since the very foundation for issuing the order for eviction of Dil Azad Khan i.e. the property being wakf property was missing, therefore, the appellate court held that without a

proper notification declaring the property to be wakf property, the Board lacks jurisdiction inherently to pass any order under Section 43(1) or Section 43(5) of the Wakf Act. This order became final as has not been challenged by the Wakf Board. The learned District Judge in his order dated 29.9.1973 observed that the Wakf Board shall be free if law so permits to publish a notification under Section 5. Therefore, with the order dated 29.9.1973 it has been finally decided that the property in question of Dil Azad Khan was not the wakf property as it is not covered under entry at no.77 of wakf properties as published under the provisions of Wakf Act.

Subsequent to that, on 21.4.1980, an order was issued by the District Collector, Udaipur in the names of Dil Azad Khan, Bhanwar Lal and Rustam Khan. In this notice, copy of which is placed on record of writ petition no.6233/1991 as Annex.4, again it is mentioned that the land of khasra no.1926 (which was also given in the earlier notice) measuring 2 bighas 9 biswas but subsequently reduced due to some portion being included in the road, has been declared as wakf property and so has been published in Rajasthan Rajpatra Part 2K dated 16.6.1966 at page 6 but at item no.62 (earlier it was claimed to be property described in item no.77) has been entered as such in the register of wakfs mentioned under Section 26 of the Wakf Act. The notice conveyed

that with the publication of notice in the gazette, the property became wakf property conclusively and finally and, therefore, the Wakf Board is entitled to take possession from the above mentioned three persons. This notice was challenged by Dil Azad Khan and Bhanwar Lal by preferring two separate appeals no.154/1980 and 61/1980 before the learned District Judge, Udaipur. It was contended by both the appellants Dil Azad Khan and Bhanwar Lal that the learned District Judge already held that the property in dispute is not the wakf property and the Wakf Board has not published any new notification declaring the property to be wakf property by following the provisions of Wakf Act, therefore, the appellants cannot be evicted by the Wakf Board.

The learned District Judge also took note of the fact that the earlier action was taken on the basis of entry no.77 whereas now action has been initiated treating the property to be covered under entry no.62. The learned District Judge observed that the decisions given by the District Collector as well as Wakf Board were without holding any enquiry and, therefore, only on this ground, the orders of the District Collector dated 1.4.1979 as well as of Wakf Board dated 21.4.1980 were quashed. However, the learned District Judge by the impugned order dated 13.8.1991 after quashing orders of eviction of said persons, remanded the matter to the Wakf Board for holding fresh enquiry after

giving full opportunity to both the appellants and thereafter to pass appropriate orders.

Petitioner Bhanwar Lal has challenged the order of the District Judge dated 13.8.1991 by filing writ petition no.6233/1991 as the petitioner is aggrieved against the remand of the matter to the Wakf Board and according to the petitioner, the Wakf Board itself cannot hold the enquiry as Wakf Board itself is interested party. The Wakf Board being aggrieved against the orders of the District Judge, Udaipur preferred these two revision petitions no.622/1991 and 623/1991.

Plaintiff/appellant Dil Azad Khan preferred regular first appeal no.29/1991 because of the reason that the trial court dismissed his suit for declaration and injunction which was filed for the same property from which eviction has been sought by Wakf Board by initiating proceedings under Wakf Act and eviction proceedings were quashed by the District Court by the impugned order dated 13.8.1991 impugned in writ petition and two revision petitions.

Learned counsel for the respondents pointed out that after the order passed by the learned District Judge dated 13.8.1991, the Wakf Board has already issued notice to the petitioner as well as Dil Azad

Khan to appear before Wakf Board for inquiry about the property in question.

Learned counsel for petitioner Bhanwar Lal vehemently submitted that the learned District Judge clearly held that the property in question having araji no.1926 measuring 2 bighas 14 biswas is not the wakf property and that order of District Judge dated 29.7.1973 became final, therefore, the Wakf Board could not have initiated any proceedings for eviction of the petitioner who is in possession of the property in dispute. It is submitted that the wakf board itself cannot adjudicate about the nature and character and title of the property in dispute because the wakf board is party interested and is seeking eviction of the petitioner. It is also submitted that after passing of the order dated 13.8.1991, Old Wakf Act has been repealed and new Wakf Act of 1995 has come into operation and now the disputes can be adjudicated by the Wakf Tribunal constituted under Chapter 8 of the Wakf Act of 1995. It is also submitted that once a notice for eviction issued by Wakf Board and sought to be executed by District Collector through the civil court was found illegal and wholly without jurisdiction, then the learned District Judge should have quashed the notice only and should not have left the matter to the discretion of the Wakf Board and

should not have directed the Wakf Board to take action against the petitioner.

However, according to learned counsel for the petitioner, after dismissal of the first eviction proceedings against Dil Azad Khan, no new proceedings could have been initiated against any person who is in occupation of the same property because of the reason that no new notification declaring the property to be of wakf has been published under the Wakf Act. It is further submitted that the respondents cannot take one after another action for eviction of the petitioner or any other person in occupation of the land in question. It is also submitted that the copy of the notification shown by learned counsel for the respondents itself clearly shows that even the property is not covered under entry no.62 of the said gazette dated 16.6.1966. It is also submitted that the property is not identifiable which is described at item no.77 of the gazette notification and because of that reason only, earlier proceedings were quashed. A perusal of entry 62 will also show that the entry is no entry in the eye of law as under this entry, no property identifiable has been given, therefore, assuming for the sake of arguments that there is validly published gazette notification and there is mention of one property at item no.62, then that entry is absolutely irrelevant

for the purpose of taking possession of property which is in possession of the petitioner.

Learned counsel Mr.Jitendra Chopra appearing for the Wakf Board vehemently submitted that the property is wakf property. Neither the notification dated 16.6.1966 is under challenge nor the petitioner has sought any declaration that the property is not wakf property. The learned District Judge committed serious error of law by setting aside the order of District Collector dated 21.4.1980. It is submitted that in the notice Annex.4, the complete neighbourhood has been given, araji number is also mentioned and reference of entry no.62 is clearly mentioned. Therefore, the civil court could not have set aside the process of eviction initiated against the petitioner. It is further submitted that petitioner Bhanwar Lal set up an agreement alleged to have been executed by Dil Azad Khan for the land in dispute. Said agreement was examined by Forensic Science Laboratory in criminal case and it was found that the document is not containing the signature of Dil Azad Khan. However, since Bhanwar Lal died, therefore, criminal case abated against Bhanwar Lal and so far as Dil Azad Khan is concerned, he was acquitted in criminal proceedings. In view of the above reasons, according to learned counsel for the Wakf Board, Bhanwar Lal has no right, title and

interest in the property in question and, therefore, has no right to take any objection against the proceedings initiated for his eviction by the Wakf Board.

Learned counsel for the respondent also submitted that there is a proposal submitted by Dil Azad Khan for settlement with the Wakf Board and learned counsel for Dil Azad Khan also submits that the proposal was accepted but proper documentation has not been made due to death of Dil Azad Khan.

In the appeal preferred by Dil Azad Khan which is S.B. Civil First Appeal No.29/1991, the contention of Dil Azad Khan was that the property belongs to him and it is not wakf property and hence, the trial court committed error of law in dismissing the suit of Dil Azad Khan.

I considered the submission of learned counsel for the parties and perused the record as well as the notification dated 16.6.1966 containing entry no.62.

It will be worthwhile to quote entry no.77, which is also quoted by learned Civil Judge in his order dated 16.5.1970 as well as by learned District Judge in his order dated 29.7.1973 :-

Name of the Wakf	Town of village	Nature and object of wakf
1	2	3
Graveyard, Idgah Dholi Baori, Ahar Road, Ward No.13 - 4 Bighas	Udaipur	Pious, Religious, Charitable, for burial of muslim bodies.

Gross income of the Property comprised in each wakf	The amount of land revenue, cess, rates & taxes, payable in respect of such property	Expenses incurred in realisation of income & the pay & other remuneration of mutavalli of Wakf.	Other Particular
4	5	6	7
240/-	-	240/-	NIL

That entry was found not sufficient for identifying the property in dispute to be property covered under above entry no.77.

Entry no.62 as it is in gazette notification is as under :-

Name of the Wakf	Town or village	Nature and object of wakf

1	2	3
62. Graveyard - 4 Bigs.	Udaipur	Pious, Religious, Charitable, for burial of muslim bodies.

Gross income of the Property comprised in each wakf	The amounts of land revenue, cess, rates & taxes, payable in respect of such property	The expenses incurred in realisation of income & the pay & other remune-ration of mutavalli of Wakf.	Other Parti--culars
4	5	6	7

A perusal of the above entry will show that in the entry no.62, there is mention of one property as graveyard but without having any neighbourhood and this property as such cannot be identified. The description in entry no.62 is worst than the description of the property at entry no.77.

Learned counsel for the respondent Wakf Board also showed a copy of the notification published under Section 5 of the Wakf Act which reads as under :-

“REPORT OF WAKFS EXISTING IN RAJASTHAN STATE
DISTRICT UDAIPUR, TEHSIL UDAIPUR CITY

Name of the Wakf	Town or village	Nature and object of wakf
1	2	3
1. Masjid, Pathanan, Pandowari, Shops 2, Houses 4, Hoz 1 - 65 x 40.	Udaipur	Pious, Religious and for offering prayers bodies.
2. Nohra with Shops 4	Udaipur	For Religious and Charitable objects.
3. Land -14 Bigs.7Bis.	“	“

Gross income of the Property comprised in each wakf	The amounts of land revenue, cess, rates & taxes, payable in respect of such property	The expenses incurred in realisation of income & the pay & other remune-ration of mutavalli of Wakf.	Other Parti--culars
4	5	6	7
936.00	936.00		
			Nohra with Shops 4, attached in Bhilwara. 14 Bigs. 7 Bis.

The notification under Section 5 as shown is of the land measuring 14 bighas and more whereas the property shown at S.No.62 is 4 bighas only. The learned

District Judge, therefore, was right in holding that the Wakf Board itself did not even looked into their own record and further passed an order for eviction of occupants without affording an opportunity of hearing to the person in possession.

At this juncture, it will be worthwhile to mention here that whether Dil Azad Khan sold or agreed to sell the property to Bhanwar Lal was irrelevant because that was a dispute between Dil Azad Khan and Bhanwar Lal only and if Dil Azad Khan has not sold the property or did not agree to sell the property to Bhanwar Lal, then aggrieved person could be Dil Azad Khan or his successor but because of that dispute between Dil Azad Khan and Bhanwar Lal, Wakf Board cannot evict any of them in the proceedings initiated under the Wakf Act unless and until the property is found to be wakf property. The Wakf Board has right to take possession from any person who is in occupation of the wakf property under the provisions of Wakf Act and that is absolutely independent right but can be enforced if the property is wakf property, therefore, it was the duty of the wakf Board to prove the property in question to be wakf property. The Wakf Board failed to prove the property to be Wakf property covered by entry no.77 earlier and under entry no.62 in this round of litigation.

The Wakf Board could have evicted Bhanwar Lal by showing the property to be of Wakf irrespective of the fact whether he is in possession in his own right or claiming through Dil Azad Khan. Therefore, so far as eviction of Bhanwar Lal is concerned, that could also have been done only on the basis of title of the property vesting in Wakf and not otherwise and not on the basis of any weakness of title of Bhanwar Lal. Assuming for the sake of arguments that Bhanwar Lal is a ranked trespasser or obtained the property from Dil Azad Khan by deceitful means, then also, Wakf Board cannot take possession of the property from Bhanwar Lal.

The important question involved now is that learned District Judge has set aside the orders dated 1.4.1979 and 21.4.1980 seeking eviction of the petitioner and remanded the matter to the wakf board, then so far as first part of the order setting aside the order of wakf board dated 1.4.1979 and order of District Collector dated 21.4.1980 are concerned, they have been passed after well consideration of the entire facts and relevant provisions of law. So far as direction to Wakf Board to decide whether property in question is wakf property or not, that direction was unnecessary as the court below was required to examine only the correctness and executability of the impugned

order and recorded finding whether order passed by the District Collector on requisition of Wakf Board was executable or not. If the order under challenge was not executable, what the Wakf Board should do depends upon their wisdom and advise which the Wakf Board may obtain. Therefore, the order of remand and direction to Wakf Board to decide the issue whether it is wakf property or not, is set aside.

It is made clear that if wakf board still is of the opinion that the property in question is a wakf property and they can take any legal action in accordance with law under the provisions of Wakf Act, 1995, then they may take action but so far as the findings recorded on the issue of entry made in the gazette dated 16.6.1966 at S.No.77 and 62, they stand decided by this order.

In regular first appeal, since even the case of Dil Azad Khan is that the matter for settlement between the parties is under consideration and substantial steps have been taken and the documents have not been executed because of the death of Dil Azad Khan, therefore, this regular first appeal is disposed of and any finding recorded by the trial court in the impugned judgment shall not come in the way if the parties settle the dispute amicably in accordance with law.

However, it is also made clear that since the appeal is disposed of instead of upholding the judgment and decree of the trial court but at the request of learned counsel for the appellant, permission is granted to the appellant to file fresh suit in case, the matter is not settled between the appellant and Wakh Board for which none of the parties have objection.

In view of the above discussion, the writ petition no.6223/1991 is allowed, the revision petitions no.622/1991 and 623/1991 are dismissed and first appeal no.29/1991 is disposed of in the light of subsequent events.

(PRAKASH TATIA), J.

S.Phophaliya